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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 610

INDIANA REVENUE BOARD, ET AL.
Petitioners,

vs.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and RICUARD M. GIVAN and JOHN F. NEFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA AND APPENDIX

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA AND APPENDIX

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

The Petitioners, INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, Governor of the State of Indiana, as a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana, and as

a Member of the Indiana Revenue Board, TRUDY SLABY ETHERTON, as Auditor of the State of Indiana and as a Member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as a Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, and DURWOOD STRANG, as Members of the State Board of Tax Commissioners of Indiana, and G. THOMAS BLANKENSHIP, acting as Inheritance Tax Administrator, pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Appellate Court, entered in these proceedings by the Appellate Court of Indiana on the 26th day of February, 1970, Petition for Rehearing denied by the Supreme Court of Indiana on June 1, 1970. Pres. Appendix p. 13.

OPINIONS BELOW

The Judgment and Order of commitment of the Appellate Court of Indiana, sitting as a Court of original jurisdiction in this case, entered on February 26, 1970, is reported at 255 N.E. 2d 833 and appears at Pres. Appendix pps. 1 to 10.

JUISDICTION

The order of the Supreme Court of the State of Indiana dismissing the Petition to Transfer, filed on March 18, 1970, was entered on April 10, 1970, without opinion, three judges opposed to transfer and one in favor. Judge Givan abstained in all entries made in this case. Pres. Appendix p. 11.

Petition for Rehearing was filed April 27, 1970, denied June 1, 1970, three judges opposed to rehearing and one in favor. Pres. Appendix p. 13. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

PARTIES

The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, ceased to exist on January 1, 1970. Its alleged successor in interest is Respondent, City of Indianapolis. Richard M. Givan and John F. Neff, although not parties below, were granted judgment by the court below and received $837,536.57 of tax funds from the General Fund of the State Treasury as a contingent fee.

G. Thomas Blankenship, acting as Inheritance Tax Administrator, succeeded Richard A. Green on July 1, 1970.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, § 1:

> "*** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 10, Sec. 3, Indiana State Constitution:

> "Appropriations.—No money shall be drawn from the Treasury, but in pursuance of appropriations made by law."

Article 10, Sec. 1, Indiana State Constitution:

"Assessment and taxation.—The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

Article 6, Sec. 1, Indiana State Constitution:

"Secretary, auditor, and treasurer of state.—There shall be elected, by the voters of the State, a secretary, an Auditor and a Treasurer of State, who shall, severally, hold their offices for two years. They shall perform such duties as may be enjoined by law; and no person shall be eligible to either of said offices, more than four years in any period of six years."

Article 3, Sec. 1, Indiana State Constitution:

"Three departments.—The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

STATUTES

Although these Petitioners do not request a constitutional construction of any statute, there are various Indiana statutes which must be included in order that the questions here presented may be understood. These Petitioners, therefore, resubmit, in 1st Appendix C, the following statutes:

House Enrolled Act No. 1818, Acts of 1967 General Assembly (never published); p. 70;

Ch. 20, Acts of 1969 repealing House Enrolled Act No. 1818 *ib.*; p. 71;

Section of the mandate statute dealing with mandate judgment. Acts of 1881 (Spec. Sess.) Ch. 38 § 810 as amended and found in Burns' Ind. Stat. Ann. § 3-2205; p. 72;

Statutes restricting Auditor's warrants:

1. Acts of 1905, Ch. 169 § 502; Vol. 4 (1956 Replac.) Burns' Ind. Stat. Ann. § 10-3715; p. 72;
2. Acts of 1859, Ch. 138, §§ 7-8 as amended and found in Vol. 10, Pt. 1 (1964 Replac.) Burns' Ind. Stat. Ann. §§ 49-1809-10; p. 72, 73.
3. Acts of 1852, Ch. 7 § 2 as the same appears in Vol. 10, Pt. 1 (1964 Replac.) Burns' Ind. Stat. Ann. § 49-1702 (5); p. 73;

Statutes dealing with substitution of parties. Acts of 1881 (Spec. Sess.) Ch. 38 §§ 23 and 848; Vol. 2, Pt. 1 (1967 Replac.) Burns' Ind. Stat. Ann. §§ 2-227-28; p. 73); Portion of statute providing for removal of cases to the Indiana Appellate Court; Acts of 1965 (2nd Spec. Sess.) Ch. 7; Vol. 2, Pt. 2 (1968 Replac.) Burns' Ind. Stat. Ann. § 3-2129; p. 74.

Statute terminating the corporate existence of the Mass Transportation Authority of Greater Indianapolis, a municipal corporation; Acts of 1969, Ch. 173 § 1003 as found in Vol. 9, Pt. 3 (1963 Replac.) Burns' Ind. Stat. Ann. § 48-9353; p. 75.

STATEMENT OF CASE

The period covered by this petition commences with the Order and Opinion of the Court of December 16, 1969, and

continues through to the termination of the contempt proceedings. The Statement of the Case in the prior petition for certiorari filed on the 11th day of June, 1970, No. 1680, covers all proceedings up to and including December 16, 1969.

All of the Petitioners have an interest in the questions here raised although Trudy Slaby Etherton is the Petitioner primarily concerned with the Court's action. The Petitioners request that this petition be considered with the Petition filed on the 11th day of June, 1970, No. 1680. Inasmuch as this petition covers part of the same proceedings, and the same parties, as Petition for Certiorari No. 1680 filed on June 11, 1970, and for convenience of all concerned, the separate Appendices filed with the prior petition will be utilized and referred to as "1st Appendix A, B, or C".

Summary of Prior Proceedings
History of the Act

Before January, 1967, the inheritance tax received by the State became a part of the General Fund by statute.

In February, 1967, the House and Senate of the State of Indiana passed House Enrolled Act 1818 which provided for a special account for a return from the State to each county of 90% of the inheritance tax received from the county, 1st Appendix C, p. 70. In Marion County the Mass Transportation Authority, a municipal corporation, was designated by the statute as the recipient of Marion County's share of the inheritance tax so returned. The balance of the tax, retained by the State, was to be then credited to the General Fund, 1st Appendix C, p. 71.

House Enrolled Act 1818 was passed on the last day of the legislative session and the Governor did not act upon

the bill or file the bill in the Office of the Secretary of State. The bill was never published or promulgated and, under Indiana law and custom since the Constitutional Convention of 1851, as well as by virtue of a prior Indiana Supreme Court decision (*State ex rel Owens v. 40th Judicial District*, (1931), 202 Ind. 354, 174 N.E. 423). was considered to have been vetoed by the Governor.

Mandate Proceedings

A Mandate action was filed by the Respondent attorneys for the Mass Transportation Authority on July 26, 1967, attacking the Governor's veto and claiming that House Enrolled Act 1818 had become the law of the State and asking that the incumbent officials be ordered to perform their duties under said Act.

On December 31, 1968, the Appellate Court, sitting as a trial court, entered its opinion reversing the law dealing with the Governor's veto power and holding that House Enrolled Act 1818 was the law and had been the law of the State since January of 1967, and found that the M.T.A. should have judgment, 1st Appendix B1, p. 25.

On December 31, 1968, the inheritance tax collected during 1967 and 1968 had been handled in conformity with the 1931 Act, Burns' Ind. Stat. Ann. § 7-2414. The Inheritance Tax Commissioner's certificates provided for by H.E.A. 1818 had not been issued and the fund had never been established. 1st Appendix C, p. 70.

The Petitioner, Trudy Slaby Etherton, entered into her term of office on December 1, 1968, and on that same day, John P. Gallagher's term of office expired. Respondent attorneys for Mass Transportation Authority did not cause her substitution as a party defendant before entering judgment or at any other time in this proceedings.

After Mandate Opinion of December 31, 1968

A Petition to Transfer was filed with the Supreme Court on January 10, 1969, which was denied on February 6, 1969 with opinions, 1st Appendix, p. 42. The vote was two judges for transfer, two against transfer and one abstaining.

The State Legislature enacted Ch. 20, Acts of 1969, which retroactively repealed House Enrolled Act 1818, on the 12th day of February, 1969, 1st Appendix C, p. 71. The Appellate Court declared Ch. 20, Acts of 1969, to be a valid retroactive repeal in all respects except as to its judgment of December 31, 1968, in favor of the Mass Transportation Authority, a municipal corporation, 1st Appendix A, p. 1 at 10.

Collection Proceedings

The Opinion of December 31, 1968, declared House Enrolled Act 1818 an enacted statute but did not mandate the named officials or the then incumbent Auditor to act under said statute nor, in the absence of evidence, determine a sum certain due to the M.T.A. by virtue of said judgment.

On February 28, 1969, Respondent attorneys filed for the M.T.A. a Verified Petition for Order for Payment of Funds pursuant to Judgment, attaching documents purporting to establish a sum certain. On the same day Respondent attorneys filed Notice of Intention to Hold Attorneys Lien attaching a purported contract with the Mass Transportation Authority for a contingent fee of 10% of the "first year's Marion County inheritance tax revenue" received by the Authority as a result of counsel obtaining a court determination that Act 1818 of the 1967 Indiana General Assembly is in fact law.

Petitioners filed a Motion to Dismiss said Verified Petition for Order for payment of funds on April 11, 1969. Stating that this case had become a new and distinct action against the Sovereign State of Indiana contrary to Article 4, Section 24 of the Indiana Constitution; that the Mass Transportation Authority, as a municipal corporation, had not been given the power to maintain the suit; that House Enrolled Act 1818 had been repealed; and called to the attention of the Respondents that the Auditor of State was not included as a defendant.

On April 21, 1969, Respondent Attorneys filed an Answer in Opposition to the Motion to Dismiss and a brief. Petitioner Etherton, nor any of the other then incumbent officials were substituted nor was substitution requested.

APPELLATE COURT'S MANDATE ORDERS

On October 21, 1969, the Appellate Court, sitting as a trial court, overruled Petitioners' Motion to Dismiss and entered its first mandate. This was followed by three other mandate orders, the last of which was filed on December 16, 1969, with the Court's Opinion, 1st Appendix A, p. 1 to 24.

Contempt Proceedings

The mandate of December 16, 1969, required the Auditor to issue her warrant on or before December 22, 1969, 1st Appendix, p. 23. The Auditor, Trudy Slaby Etherton, filed a response on December 22, 1969, showing additional reasons why she could not issue the warrant: On December 23, 1969, Respondent attorneys for the Mass Transportation Authority filed their Verified Information and Affidavit for Rule to Show Cause.

On February 5, 1970, the Appellate Court issued its Rule to Show Cause and require Trudy Slaby Etherton, Auditor, to appear on the 16th day of February to show cause why she should not be punished and committed to jail for her contempt of the court by failing to comply with its order.

On February 16, 1970, Petitioners filed their Answer to the Court's Rule to Show Cause and introduced evidence to show that there was no money in the fund to be charged as provided in House Enrolled Act 1818. After completion of evidence and argument, the Appellate Court set the matter for ruling on February 26, 1970.

Interim Orders

Although the court had held, in its opinion of December 16, 1969, that this had not become an action against the State of Indiana, (or at least that sovereign immunity was not a defense) the Appellate Court did issue an order on February 24, 1970, under Rule 70A of Indiana Rules of Procedure, to the bank presidents of three (3) banks known to be depositories of State Treasury Funds. Said order was issued at 12:00 noon pursuant to Respondent attorneys' Petition filed at 11:45 a.m. on the same day. The order, as amended, directed said bank presidents to pay over Twelve Million ($12,737,338.97) Dollars of State Funds to the Clerk of the Appellate Court for distribution as per the order of December 16, 1969.

The court apparently believed that the constitutional office of State Auditor, and also the Office of State Treasurer, could be by-passed and their powers usurped to obtain the money from the State Treasury and that the Respondents had a money judgment against the State to be satisfied pursuant to Rule 70A.

Contempt Judgment.

On February 26, 1970, Trusty Slaby Etherton, Auditor of the State of Indiana, was committed to jail for failure to obey the mandate of December 16, 1969, 2nd Appendix A, p. 7.

Petition for a Stay Pending Appeal was refused by the Appellate Court on February 26, 1970, (Court Reporter's Transcript).

Petition for Stay Pending Appeal was presented to the Supreme Court, on February 26, 1970, and on the 3rd day of March, 1970, granted a two day stay to enable the Auditor to make payment.

On March 4th, 1970, Petitioner Etherton issued her warrant under protest and registered at the same time a protest by the State Board of Finance, 2nd Appendix, p. 15.

HOW THE FEDERAL QUETSIONS WERE RAISED

Questions 1 and 2 set out in the petition filed on June 11, 1970, and assigned No. 1680, were presented to the Appellate Court in Petitioners' Answer to Rule to Show Cause filed February 16, 1970, and to the Supreme Court in Petition to Transfer, filed on March 18, 1970, and Petition for Rehearing, filed on April 27, 1970. The orders of the Supreme Court dismissing the Petition to Transfer and denying the Petition for Rehearing are set out in the Present Appendix, p. 14.

Questions A and B, of this petition, or questions with the same content, were presented to the Appellate Court

on various occasions, most recently in Petitioners' Answer to the Rule to Show Cause of February 16, 1970, and to the Supreme Court of Indiana in Petition to Transfer filed March 18, 1970, and Petition for Rehearing filed April 27, 1970.

Question C was presented in the Petition for Rehearing filed April 27, 1970, when it became apparent that the Supreme Court of Indiana would not otherwise accept the case for review.

QUESTIONS

A. Whether the order of the Appellate (trial) Court of December 16, 1969, enforced by coercive action on February 26, 1970, was in excess of the court's jurisdiction and repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution in the following particulars:

1. Petitioner Etherton was in office on December 1, 1968, but was not served with notice or given a hearing prior to the decision of December 31, 1968, nor was she substituted in this action for her predecessor in office as required by the Indiana Statutes;

2. Said mandate required the issuance of the Auditor's warrant for the benefit of a relator that had ceased to exist and for said relator's attorneys who were not parties and had not litigated their right to fees;

3. The court exercised legislative powers and authority in the issuance of its mandate and the coercive action of February 26, 1970?

B. Whether the Court's action of February 26, 1970, holding Trudy Slaby Etherton guilty of contempt, and committing her to jail, for failure to obey the Court's mandate of December 16, 1969, for the reason that it required her to violate her oath of office, is repugnant to the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution?

C. Whether the Petitioners' inability to obtain review of any judgment or order entered in this cause, including the judgment of February 26, 1970, in a state that extends the right of appeal to all litigants, is repugnant to the equal protection clause and due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution?

REASONS FOR THE WRIT

Extension of the constitutional guarantees of due process and equal protection to public employees and public officers has been denied on various theories, including: the right-privilege concept, enunciated in *Davis v. Massachusetts*, 167 U.S. 43, and the concept that officials represent the sovereign, and that the Fourteenth Amendment was to protect persons against action by the sovereign.

In this case, John P. Gallagher, State Auditor, was sued, with other State officers, by a municipal corporation for a distribution of tax funds. Although this was a mandate action, Trudy Slaby Etherton, as Gallagher's successor in office, was never given notice nor an opportunity for hearing although she took office before the decision on the merits. The finding for the Plaintiff, Mass Transporta-

tion Authority, was entered on December 31, 1968 and Trudy Slaby Etherton was joined when the mandate was issued on October 21, 1969 by the Court *sua sponte* without motion or any request by Respondent. She was eventually found guilty of contempt and sent to jail.

She claims lack of due process and lack of equal protection in that she was forced by coercion to violate her oath of office by making, under coercion, a distribution of tax funds contrary to the United States Constitution, the Indiana Constitution, and Indiana State Statutes. She also claims that she was not given notice nor an opportunity for hearing on the merits; nor was she ever joined as a party, as required by Indiana law.

With the trend toward abolishment of sovereign immunity, and Indiana is no exception, standards for due process as applied in mandate and injunction cases against public officers should be reviewed and guidelines set.

Where the action is against the officer and not the office, as in mandate and injunction, it should be made clear that the constitutional guarantees are available to the officer in case of unfair or abusive action by the courts.

Finally, in a state in which the right to an appeal is extended to all litigants, the failure of the state judicial machinery to provide judicial review in this case, particularly where basic constitutional and statutory fiscal questions are involved, constitutes a breach of judicial duty and a denial of Petitioner's Constitutional rights.

A. (1) Notice, right to be heard, and substitution under Indiana law, have been commented on in the Petition for a Writ of Certiorari filed in this Court on June 11, 1970, and assigned No. 1680. Petitioners incorporate the com-

ments appearing on pages 20 to 23 into this petition by reference. These few additional comments seem pertinent.

The decision below is inconsistent in principle with *Snyder v. Buck*, (1950) 340 U.S. 15.

Although there is no question of abatement, there is as serious an abuse of procedural rules as existed in *Snyder v. Buck, id.*, where this court followed the procedural statute supplied by Congress.

These Petitioners advised Respondents and the Trial (Appellate) Court of the failure to substitute Trudy Slaby Etherton as Auditor in their Motion to Dismiss (memorandum) filed April 4, 1969. This was in ample time for the Respondents to make the substitution and time had not then run against opening the decree of December 31, 1968.

In spite of the pleadings, exhibits and testimony at the hearing of February 16, 1969, showing the Court that Trudy Slaby Etherton was State Auditor prior to the Judgment of December 31, 1968, the Court has refused to recognize this. As late as February 26, 1970 in *State ex rel M.T.A. v. the Indiana Revenue Board et al*, 255 N.E. 2d, 833, the Court still showed John P. Gallagher as Auditor of the State of Indiana on December 31, 1968, in a footnote. Pres. Appendix, p. A-1.

It was Respondents' duty to substitute Trudy Slaby Etherton for John P. Gallagher as Auditor prior to Judgment, and she was "entitled to the same notice, to be given in the same manner as required for defendants in the commencement of an action". Acts 1881 (Spec. Sess.), Ch. 38, Sec. 848, Burns' §2-228. 1st Appendix C, p. 74.

According to the terms of the Acts of 1881 (Spec. Sess.) Ch. 38, Sec. 810, as amended, Burns' § 3-2205, only "all defendants duly served with process or notified by publi-

cation in such action. . . .'' are subject to attachment, fine or imprisonment for disobedience of the Writ. 1st Appendix C, p. 72.

The above statutes were in effect prior to and at the time of Judgment on December 31, 1968 and at the time of the Court's Mandate on December 16, 1969. On January 1, 1970 new Indiana Rules of Procedure went into effect and Burns' §§ 2-227 and 2-228 were repealed as of that date.

A. (2) Relator Mass Transportation Authority ceased to exist on January 1, 1970.

Coercion by civil contempt and attachment, in a mandate action, is for the benefit of the Relator. See *McCrone v. United States*, (1938), 307 U.S. 61, where the Court said:

> "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, *serves only the purposes of the complainant* and is not intended as a deterrent to offense against the public." (Our emphasis)

Where there is no party entitled to be benefited, proceeding with a civil contempt action is meaningless except as punishment or an exercise of judicial will repugnant to concepts of fairness and justice.

On January 1, 1970, the day the Mass Transportation Authority ceased to exist, the Indiana Supreme Court adopted Trial Rule 19 F(3), Indiana Rule of Civil Procedure, which reads as follows:

> "A judgment for or against a governmental organization shall also bind affected or successive representatives of such organization. When a governmental rep-

> resentative is named as a party in his individual name or in his individual name along with his official title, the judgment, in an appropriate case, may bind him in his individual capacity but no judgment against him in his individual capacity shall be rendered against him unless he is so named. No action against a governmental organization or against a governmental representative in his official capacity shall be abated, affected or delayed because of the death, incapacity or replacement of a named or unnamed governmental representative, or because of the fact that the name, functions or existence of the governmental organization have been altered or terminated. In either case the action shall proceed without substitution of successor who shall be bound by the judgment in their official capacity."

The above rule, in so far as it is applied to mandate and injunction suits against officials such as the State Auditor, should be considered offensive to due process.

With the gradual abolition of sovereign immunity as a defense the rules pertaining to notice and hearing where public officials are subjected to mandate and injunction should be re-examined. See *Snyder v. Buck* (1950), 340 U.S. 15, Dissenting Opinion, pages 28-31.

Under the above trial rule and without substitution of parties so that these Petitioners could object, the Trial (Appellate) Court provided for the payment of the House Enrolled Act 1818 Funds to the City of Indianapolis, a municipal corporation. The City of Indianapolis, which does not include all of Marion County as the Mass Transportation Authority did, was considered by the Court to be its successor. It is true that the powers, obligations, and duties of the M.T.A. were transferred to the Department of Transportation of the City of Indianapolis and also true that the assets of the Mass Transportation

Authority were transferred to a financial department of the City of Indianapolis. There is no specific disposition of the Judgment entered in this proceedings on December 31, 1968. Legislative intent appears to reject the concept that the City of Indianapolis succeeds to the Mass Transportation Authority's position in this case.

The 1969 Legislature repealed House Enrolled Act 1818 by Chapter 20, Acts 1969, retroactively without exception. The same Legislature later created the City of Indianapolis and its Department of Transportation and also terminated the Mass Transportation Authority, all without mention of this proceedings. In Indiana, counties and other municipal groups have only those rights specifically granted by the Legislature or necessarily implied in an express grant. Citing *Local Union No. 26, National Brotherhood of Operative Potters v. City of Kokomo* (1937), 211 Ind. 72, 5 N.E. 2d 624; *Southern Wire Co. v. Harpe* (1945), 223 Ind. 124, 58 N.E. 2d 346. Further, the grant of powers is strictly construed against the municipal corporation. *City of Elkhart v. Lipschitz* (1905), 164 Ind. 671, 74 N.E. 528; *Local Union No. 26, supra.*

In looking for legislative intent all of the acts passed at the same session of the Legislature dealing with the same subject should be considered.

It is not rational to suppose that the Legislature that passed Chapter 20, Acts of 1969, which retroactively repealed House Enrolled Act 1818 of 1967 without a saving clause intended that the new City of Indianapolis should succeed to and enjoy a distribution of funds under that account.

Acts dealing with the same subject matter passed by the same session of the Legislature must be construed *in pari materia*, *(Beamer v. Waddell* [1943], 221 Ind. 232, 45

N.E. 2d 1020), and it is presumed that the Legislature knows the existing law when it enacts legislation. *McClarnon v. Stage* [1939], 215 Ind. 157, 19 N.E. 2d 252. If the Mass Transportation Authority had a judgment right to the distribution of certain tax money under House Enrolled Act No. 1818 those enactments concerning the distribution of tax money are in *pari materia* with the statutes creating and giving certain powers to the Consolidated City of Greater Indianapolis.

The trial (Appellate) Court, in continuing this proceedings through to its Judgment of Contempt and Commitment without a Relator and without providing an opportunity for these Petitioners to object to the successor party, abused the concept of a civil contempt and deprived the Petitioners of an opportunity to question the validity of the new parties' claim as a successor.

A. 2 (b) The Judgment granted attorney fees to persons not parties.

The Court, on February 26, 1970, coerced compliance with a mandate which granted judgment to the Mass Transportation Authority's attorneys, Respondents Richard M. Givan and John F. Neff. These attorneys were neither parties nor had their contingent fee been litigated in this action.

A notice of intention to hold a lien was filed in the Clerk's Office, in the customary fashion, with a purported contract for a contingent fee.

Ordinarily, the money would be paid to the clerk for the benefit of the party taking judgment and would be held by the clerk until the parties either agreed or litigated the fee.

In Indiana, unless there is a statute authorizing the Court to allow fees pursuant to proof, such an order is void. In such a case the Indiana Supreme Court in *Donech v. Donech* (1938) 214 Ind. 559, pps. 562, 564; 16 N.E. 2d, 877, pps. 879, 880 said:

> "'The rule is well settled that a judgment or order for the payment of fees directly to an attorney for one of the parties is a judgment in favor of persons not parties to the suit, and for that reason irregular and void.'"

In *Donech, id.*, there had been a civil contempt proceedings. With reference to the contempt proceedings, the Court said at p. 880 of the N.E. report:

> "'The court having no power or jurisdiction to enter such a judgment the information filed is insufficient to sustain a contempt proceeding.'"

Including attorney fees in a mandate without evidence was held invalid in *Sears Roebuck & Co. v. State ex rel Thelma Pearl Ryan*, (1968), 248 Ind. 169, 225 N.E. 2d 175. The void portion of the order is not separable from the whole, rendering the entire order void.

Since the order is void, the contempt cannot stand. *Donech, supra.*

The Sears case also stresses the necessity for strict compliance with the mandate statute. See Burns' Ind. Stat. §3-2205, 1st Appendix C, p. 72.

The City of Indianapolis had no opportunity to object to the $827,586.59 fee, if its officials so desired, because the City of Indianapolis was never a party to this action. The Mass Transportation Authority could not object after January 1, 1970 because it had ceased to exist.

Neither the tax payers nor the State Board of Accounts, which reviews the propriety of municipal expenditures, can question the propriety of this contingent fee contract. It makes no difference if it is *ultra vires* or excessive. It has been adjudicated.

The mandate was in excess of the Court's jurisdiction and, therefore, void. The coercion of the Auditor deprived her of her liberty and injured her in her occupation as a public servant.

A. 3. The Court Exercised Legislative Power and Authority.

The trial (Appellate) court held on December 16, 1969 that because the rights involved were public rights, Ch. 20, Acts 1969, (1st Appendix C, p. 71), was a valid repeal in all respects except as to the judgment of December 31, 1968. The Court based its holding on the separation of powers provided for by Article 3, § 1, Indiana Constitution (this petition p. 4).

Accepting this for purposes of argument, does the fiction that House Enrolled Act 1818, Acts 1967 (1st Appendix C, p. 70) is in existence only as to the judgment of December 31, 1968, include the existence of legislative authority for the Auditor's warrant, contrary to the legislative intent?

The repeal acts' revocation of the Auditor's authority under H.E.A. 1818 was general and retroactive. The Court's application of the separation of powers concept should also extend to the legislature and its creature, the Auditor, under Article 6, § 1 of the Indiana Constitution (this petition p. 4).

An orderly concept of government and the separation of powers doctrine requires an answer. The Petitioners

believe that an objective application of the separation of powers concept under the Court's holding requires that if the judgment stands as a product of the judiciary, the Auditor's authority flowing from the legislature is revoked, and that the judiciary exceeds its powers in supplying legislative authority to the Auditor.

We find no Indiana cases on this point; however, some state courts have considered the question. Where defendants are ordered to perform certain duties enjoined by a specific statute and thereafter the statute is repealed, the proceedings will terminate.

> 55 C.J.S. Mandamus § 41, p. 72; See also cases there cited, i.e. *State v. Crawford*, 105 S. 446, 90 Fla. 264; *Culcomper, Ill.* Mayor, etc., 60 Iowa 156, 14 N.W. 214.

The same rule of law is stated at 55 C.J.S. §358, p. 626, where it is stated:

> "A repeal of the law under which the relator's right to the performance of a duty by respondent accrued justified respondent's refusal further to obey the writ." *Mooney v. Drainage District No. 1 of Richardson County*, 274 N.W. 467, p. 474. Also *Tubbs v. Linn*, 70 N.W. 2d 372, p. 377.

The question does not properly arise where privately vested rights are involved because the repeal statute would be unconstitutional for all purposes.

The Petitioners maintain that exercise of and supplying of legislative powers and authority to the Auditor by the judiciary in order to force issuance of the Auditor's warrant is an abuse of due process.

B. Trudy Slaby Etherton's oath, as Auditor, was ". . . that I will support the Constitution of the United States, the Constitution of the State of Indiana and that I will

faithfully and impartially discharge my duties as *Auditor of State, State of Indiana*, to the best of my skill and ability, so help me, God." 1st Appendix C, p. 76.

The Auditor swore that she would uphold the Constitutions of the United States and of the State of Indiana. The Constitution of the United States, Amendment XIV, § 1, provides that "No state shall . . . deny to any person within its jurisdiction equal protection of the laws." But the mandate of December 16, 1969 provided for a distribution of tax money from the General Fund of the Treasury which would favor the tax payers in one county and discriminate against the tax payers in 91 counties. The Auditor protested the Court's order on this basis in a petition for rehearing before the Supreme Court of the State prior to the contempt proceedings, in her answer to rule to show cause filed February 16, 1970 with the Appellate Court, and in both the petition for transfer and petition for rehearing after the contempt proceedings. She was required to issue her warrant in violation of her oath or accept imprisonment.

The equal protection provision applies to Article 10, § 1 of the Indiana Constitution which provides that "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation".

The Auditor's office is a constitutional office provided for in Article 6, § 1 of the Indiana Constitution where her duties provide that she ". . . shall perform such duties as may be enjoined by law. . . ." The Indiana Constitution also provides in Article 10, § 3 that "No money shall be drawn from the Treasury but in pursuance of appropriations made by law". The Legislature has directed by one criminal statute and three civil statutes that she shall not draw a warrant unless there be money in the Treasury be-

longing to the *particular fund upon which* it is drawn and in conformity to appropriations made by law. These statutes are Burns' §10-3715, Burns' §49-1809, Burns' § 49-1810, Burns' § 49-1702, all found in the 1st Appendix, pps. 72 and 73.

House Enrolled Act 1818, Acts 1967, upon which the Court's mandate was based (1st Appendix C, 70) provides for an appropriation from a special fund, i.e., the receipts of the previous quarter, and further provides that upon certificate supplied by the Inheritance Tax Administrator on the last day of April, 1967, and thereafter on or before the last day of July, October, January, and April the Auditor of the State was to pay ninety per cent (90%) of the inheritance tax received back to the counties that paid it in, and the balance of the tax was to be then credited to the State General Fund.

House Enrolled Act 1818 was repealed retroactively by Chapter 20, Acts of 1969, one month and twelve (12) days after the Court's Judgment of December 31, 1968.

The mandate and opinion of the Appellate Court on December 16, 1969 held the repeal ineffective, that there was an appropriation in H.E.A. 1818 but ignored the provisions of H.E.A. 1818 concerning payment, holding that all inheritance tax money paid in was by prior law a part of the General Fund of the Treasury.

The Auditor's duties enjoined upon her by law required that she refuse to issue her warrant. Under Burns' § 49-1702, (1st Appendix C, p. 73) she believed that she was directed by the following language:

> "Duties. He shall . . . Fifth. Examine and liquidate the claims of all persons against the state in cases where provisions for the payment thereof shall have

been made by law; *and when no such provisions, or an insufficient one, has been made, to examine the claim, and report the facts, with his opinion thereon, to the legislature;* and no allowance shall be made to refund moneys from the treasury without his statement either for or against the justice of the claim." (our emphasis)

She also knew that there was no money in the fund established by H.E.A. 1818, and that she was forbidden by law to issue her warrant where there was no money belonging to the proper fund to be charged. Burns' 49-1809.

All of the above was repeatedly pointed out to the Appellate and Supreme Courts of the State of Indiana. The Appellate Court ignored her statements and the proof offered by affadavit and sworn testimony at the hearing of February 16, 1970, and insisted that she draw her warrant on the General Fund of the State Treasury although there was no appropriation against the General Fund.

In each instance above, the Appellate Court by its coercive action required her to violate her oath of office or go to jail.

Mandate actions in their nature are enforced only when the Relator has a clear and present right and the defendant a clear and imperative duty. *Gibson v. State ex rel. Sorrells* (1968), —Ind. —, 240 N.E. 2d 544.

Mandate will not be used to require performance of a discretionary duty in a particular way. *State ex rel. Cedar Creek School Tp. v. Curtin*, (1940) 217 Ind. 190, 26 N.E. 2d 909.

The Court, in requiring the Auditor to perform acts which violated her oath of office and the legislative di-

rective, acted in excess of its jurisdiction and denied due process to Petitioner Etherton, unfairly depriving her of liberty and injurying her reputation in her chosen occupation as a public servant.

C. Inability to Obtain Review.

This case was removed to the Indiana Appellate Court under Acts, 1965 (2nd Spec. Sess.) Ch. 7, Burns' Sec. 3-2121-3-2129, from a Marion County Superior Court for trial by the Appellate Court.

Because the removal statute provides for review by transfer to the State Supreme Court, and further because the five-judge Supreme Court was split two for transfer and two in opposition and one abstaining in each attempt to transfer until the petitions to transfer the contempt proceedings, when the judges split, three for dismissal, one for transfer, and one abstaining (the vote was also the same on the petition for rehearing). This case, by virtue of the denial to transfer, has been affirmed by the Supreme Court in all of its aspects. However, under Indiana law, as declared by the Court in *State ex rel. Mass Transp. Auth. v. Indiana Revenue Bd.*, (1969) 254 N.E. 2d, p. 1, the result of the affirmance is that the Appellate Court's decision and rulings have become the law of the case, presumably having no effect on previous Supreme Court rulings.

State ex rel Owen v. Fortieth Judicial District (1931), 202 Ind. 354, 174 N.E. 423 holding contrary to this case as to the meaning of Article 5, Sec. 14 of the Indiana Constitution (in Opinion, 1st Appendix B. 1, p. 28), is still the law in this state, except for this case.

Under *State ex rel Owen v. Fortieth Judicial District, supra,* House Enrolled Acts 1818 has never had a valid existence.

Other rulings by this Court as to appropriations, the separation of powers justification for sustaining the judgment, the waiver of notice, sovereign immunity, and other rulings are only applicable to the boundaries of this case, in no way binding on the State Supreme Court or other courts.

After the payment of over twelve million dollars ($12,000,000) to Respondents, the basis for this payment could be changed next month. Realizing this danger and in fear of the effect of random and contradictory decisions, Petitioners filed a petition for appointment of judges on December 16, 1969. The purpose of this petition was to make the Supreme Court aware of the procedure problems and in interest of uniformity in the interpretation and application of the law. The petition was denied. See 254 N.E. 2d, p. 1, *supra*.

The constitutional and statutory questions in this case are significant and Petitioners' inability to obtain review seems to them to point out a procedural defect that denied them, and particularly Petitioner Etherton, equal protection and to violate the principles set out in *Warren v. Indiana Telephone Co.* (1940), 217 Ind. 93, 26 N.E. 2d 399, pps. 405-408.

CONCLUSION

For the above reasons Petitioners respectfully suggest that a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Indiana.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of the State of Indiana
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Indianapolis, Indiana 46204

RICHARD C. JOHNSON
Chief Deputy

WENDELL C. HAMACHER
Chief Counsel—Staff

PRESENT APPENDIX

STATE of Indiana, on the relation of the MASS TRANSPORTATION AUTHORITY OF GREATER INDIANAPOLIS, A MUNICIPAL CORPORATION, Plaintiff-Petitioner,

v.

INDIANA REVENUE BOARD, Edgar D. Whitcomb, as a Member of the Indiana Revenue Board, John K. Snyder, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board, Trudy Slaby Etherton, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, Indiana Department of State Revenue, the State Board of Tax Commissioners, Joseph D. Geeslin, Jr., Carleton L. Phillippi, and Durwood Strang, as Members of the State Board of Tax Commissioners of Indiana, Richard D. Green, as Inheritance Tax Administrator, Defendants-Respondents.*

No. 767A39.

Appellate Court of Indiana, In Banc.

Feb. 26, 1970.

Contempt proceeding against state auditor for refusal to comply with prior court order. The Appellate Court

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* On December 31, 1968, the date of the judgment in this case, the named defendants were then incumbent officeholders and were named were named in their capacities as such officeholders, viz: Roger D. Branigin, as a Member of the Indiana Revenue Board; John P. Gallagher, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board; William L. Fortune, Commissioner of the Indiana Department of State Revenue; and Larry P. Mohr and Herbert C.

held that state auditor was guilty of contempt in refusing to draw warrant payable to clerk of Appellate Court as ordered in case wherein it was determined that state officers must comply with act providing for distribution of 90% of inheritance tax funds to mass transportation authority of county and auditor must be committed to custody of sheriff and held in county jail until such time as she might purge herself by drawing such warrant.

Order accordingly.

See also, Ind.App., 253 N.E.2d 725.

1. Constitutional Law

Judiciary has right to review acts of Congress and actions of Executive to determine their constitutionality.

2. Constitutional Law

Constitution is supreme in case of conflict with acts of Congress or Executive.

3. Constitutional Law

Court is guardian of Constitution.

4. Constitutional Law

Courts have exclusive responsibility and duty to interpret the law, the Constitution, statutes of General Assembly and case law and to apply interpretation to case at issue.

Holmes, as Members of the State Board of Tax Commissioners of Indiana; and T. Michael Smith, as Inheritance Tax Administrator. This court takes judicial notice that these named defendants are no longer in office, and the court, on its own motion has substituted the present incumbents in office as the nominal defendants.

5. Constitutional Law

No privilege protects elected public official from being disciplined by court for nonfeasance, misfeasance or malfeasance in office.

6. Evidence

Appellate court took judicial notice that certain defendants named as state officers were no longer in office.

7. Mandamus

State auditor was guilty of contempt in refusing to draw warrant payable to clerk of Appellate Court as ordered in case wherein it was determined that state officers must comply with act providing for distribution of 90% of inheritance tax funds to mass transportation authority of county and auditor must be committed to custody of sheriff and held in county jail until such time as she might purge herself by drawing such warrant.

Donald E. Bowen and Ronald S. Lieber, Indianapolis, for plaintiff-petitioner.

Trudy Slaby Etherton, in pro. per., and by Theodore L. Sendak, Atty. Gen., Richard C. Johnson, John Carmody, Sheldon A. Breskow and Wendell C. Hamacher, Deputy Attys. Gen., for defendants-respondents.

PER CURIAM.

Because of the extremely complex issues in this case, it has become apparent to us that the basic premises on which the decision of this court rests have been obscured by a great deal of misguided oratory, and for that reason we would like to briefly review our position.

[1-4] In the case of *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), decided by the Supreme Court of the United States, a basic and inherent right of the judiciary was established, that being the right to review acts of Congress and actions of the Executive to determine their constitutionality. The effect of that decision was to establish that the *Constitution* is supreme in case of conflict, and, further, that the *court* is guardian of the Constitution. The courts have traditionally in a democratic form of government had the *exclusive* responsibility, in fact the *duty*, to interpret the law—the Constitution, statutes of the General Assembly, and case law—and apply the interpretation to the case at issue.

It should be understood that the court does not initiate disputes—it settles controversies which have arisen between *parties*. Thus, in the instant case, the plaintiff-petitioner, Mass Transportation Authority, sought a remedy against State officials. The controversy was duly submitted to the courts and eventually was heard and *decided* by this court.

While the issues themselves may be technical and complicated, the method of deciding them is not. This court reviewed the statutes, the applicable constitutional provisions and the applicable cases. The court then applied its findings and interpretations and held in favor of the plaintiff-petitioner, Mass Transportation Authority. To arrive at this decision this court did not *invent* law to support its decision; it did not *contrive* by means of judicial fiat to deprive one of the parties of their rights; it did not knowingly or willingly provoke one of the parties to take the law into their own hands.

It seems clear beyond need for supporting authority that this court has done *nothing more* than it is bound by the Constitution of this State to do—*interpret the law*.

And yet the defendant has continued to question *our right to interpret* the law. The spectre of lawlessness became more vivid each passing day, as one after another, statements of intent to *disregard the law* and to *disobey the order of the court*, emanated from parties-defendant to this suit; not simply citizens of this State, but our highest elected officials. Surely no disagreement, no matter how controversial or how costly, is worth the price defendants appeared willing to pay—abandonment of the rule of law. The dictionary defines "anarchy" as a "lawless condition of society" and the "non-existence or incapability of governmental rule." Surely the word describes the condition this State would be in if the Executive Branch of Government willingly and knowingly refuses to obey the law and establishes itself as a superjudiciary to decide which laws it will obey, and which it will not.

The framers of our Constitution provided a system of checks and balances because they realized and appreciated the lesson of history that no man or group of men can be safetly entrusted with unlimited power. They established this Constitution to be changed only by the procedure of amendment in order that the fundamental principles of our Government should be secure against the dangers of temporary popular passion or the personal prejudices of public office holders.

What check is there on the actions of the Executive if it is not bound by the law as the law is determined by the courts pursuant to the duty prescribed for them by the Constitution?

What check is there on the acts of the General Assembly if redress by the courts of grievances growing out of those acts is unavailable, or, worse, ineffective?

The judicial branch of government is checked by the very nature of its creation and its existence. Courts properly have neither the power of the purse (the General Assembly does) nor the power of the sword (the Governor does).

Neither the purse nor the sword can protect the liberty of free citizens.

A learned and distinguished public servant once said:

"We have in this country but *one security*. You may thing that the *Constitution* is your security—it is nothing but a *piece of paper*. You may think that the *statutes* are your security—They are nothing but *words in a book*. You may think that *elaborate machinery of government* is your security—it is nothing but an organization of mortal men. All of these things are nothing without strong, sound and uncorrupted public opinion and respect for the law."

[5] We would point out that *no* privilege protects an elected public official from disciplining by the court for non-feasance, misfeasance or malfeasance in office.

We would further point out that the issues which have been raised—in some instances three, four and five times over—have been answered by this court, not ignored or overlooked. The defenses raised in behalf of the Auditor in the contempt proceeding were not new or novel—they were the same issues we have determined before. The Auditor asserts that she is bound by the Constitution and the laws of this State. We assert the law is before her. Her duty is

clear. There is no malice in our order. There is only the intent that the dictates of the people through their Constitution be observed, and that a government of law for the State of Indiana be preserved.

ORDER

[6, 7] Comes now the plaintiff-petitioner by attorneys Donald E. Bowen and Ronald S. Lieber, and comes also the defendant-respondent, Trudy Slaby Etherton, Auditor of the State of Indiana, in her own proper person, and by her attorneys, Theodore L. Sendak, Attorney General of the State of Indiana; Richard C. Johnson, Deputy Attorney General; John Carmody, Deputy Attorney General; Sheldon A. Breskow, Deputy Attorney General; Wendell C. Hamacher, Deputy Attorney General, and the court, having heretofore heard evidence on the issue joined by plaintiff-petitioner's affidavit alleging contempt and defendant-respondent's answer thereto, and the court having taken its finding under advisement, and now having considered the same and being duly and fully advised in the premises, finds that the allegations of plaintiff-petitioner's affidavit alleging contempt are true and that the defendant-respondent has failed to purge herself of contempt and is guilty of a contempt of this court in refusing to draw a warrant payable to the Clerk of this court, as heretofore ordered by this court on December 16, 1969.

The court further finds that by reason of defendant-respondent's contempt of this court she shall be committed to the custody of the Sheriff of Marion County, Indiana, and be held by him in the Marion County Jail until such time as she may purge herself by drawing said warrant on the Treasury of the State of Indiana, payable to the

Clerk of this court, in compliance with the order heretofore issued on December 16, 1969, or until further order of this court.

It is, therefore, ordered, adjudged and decreed by the court that the defendant-respondent herein, Trudy Slaby Etherton, Auditor of the State of Indiana, be, and she is hereby, found guilty of contempt of this court.

It is further ordered and decreed that the said Trudy Slaby Etherton be, and she is hereby, committed to the custody of the Sheriff of Marion County, Indiana, and be held by him in the Marion County Jail until such time as she may purge herself by drawing said warrant on the Treasury of the State of Indiana, payable to the Clerk of this court, as heretofore ordered on December 16, 1969, which order, omitting caption, reads as follows:

"ORDER"

"It appearing to this Court that pursuant to Order of the Court made and entered on November 19, 1969, James O. Mathis, as Commissioner of the Indiana Department of State Revenue and Richard A. Green, as Inheritance Tax Administrator of the State of Indiana, did on the 20th day of November, 1969, file with the Clerk of the Supreme and Appellate Courts duplicate certified computations of the amounts deposited by Marion County, Indiana, in the Indiana Inheritance Tax Account of the General Fund of the State Treasury for the calendar years 1967 and 1968.

"It further appearing that plaintiff, State of Indiana, on the relation of The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, did on December 2, 1969, file its Answer to Response to Order of

This Court—November 19, 1969, which Answer accepts as true the certified computation as hereinabove mentioned.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Clerk of the Supreme and Appellate Courts transmit *instanter* a copy of said certified computation to Trudy Slaby Etherton, Auditor of the State of Indiana.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Trudy Slaby Etherton, Auditor of the State of Indiana, on or before December 22, 1969, draw and issue a warrant upon the General Fund of the Treasury of the State of Indiana for a sum equal to ninety percent (90%) of the amount so computed and certified and that she immediately present and deposit said warrant with the Clerk of the Supreme and Appellate Courts.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that John K. Snyder, Treasurer of the State of Indiana, honor said warrant when called upon to so do.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Supreme and Appellate Courts shall, upon receipt of said warrant, disburse the same as follows:

"1. Said amount so deposited with the Clerk of the Supreme and Appellate Courts of Indiana shall be disbursed by said Clerk to The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, less the amount to be disbursed to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, in satisfaction of an attorneys' lien filed by said attorneys for the plaintiff on February 28, 1969.

"2. The Clerk of the Supreme and Appellate Courts shall, upon receipt of the warrant representing ninety percent (90%) of State Inheritance Taxes remitted to the Indiana Department of State Revenue, Inheritance Tax Division, from Marion County, Indiana, which were deposited in the 'Inheritance Tax Account' of the State Treasury for the period January 1, 1967, through and including December 31, 1968, disburse ten percent (10%) of said funds so remitted for the period beginning January 1, 1967, to and including December 31, 1967, to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, which ten percent (10%) disbursement is in satisfaction of an attorneys' lien, filed by the attorneys of record for the plaintiff herein on February 28, 1969.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this Order be served upon John K. Snyder, Treasurer of the State of Indiana; upon Trudy Slaby Etherton, Auditor of the State of Indiana; and upon Kendal E. Mathews, Clerk of the Supreme and Appellate Courts, by the bailiff of this court.

"ORDERED this 16 day of December, 1969, at Indianapolis, Indiana.

"/s/ John W. Pfaff

JOHN W. PFAFF
Chief Justice

WHITE, J., not participating"
or until further order of this court.

White, J., not participating.

IN THE

SUPREME COURT OF INDIANA

STATE OF INDIANA, on relation of) The Mass Transportation Authority of) Greater Indianapolis, a municipal corporation, *Plaintiff,*)

v.) No. 767A39

INDIANA REVENUE BOARD,) EDGAR D. WHITCOMB, as a Member) of the Indiana Revenue Board,) JOHN K. SNYDER, Treasurer of the) State of Indiana, and as a Member of) The Indiana Revenue Board,) TRUDY SLABY ETHERTON, Auditor) of the State of Indiana, and as a Member of the Indiana Revenue Board,) INDIANA DEPARTMENT OF STATE) REVENUE,) JAMES O. MATHIS, as Commissioner) of the Indiana Department of State) Revenue,) THE STATE BOARD OF TAX COMMISSIONERS,) JOSEPH D. GEESLIN, JR., CARLETON) L. PHILLIPPI, as Members of the) State Board of Tax Commissioners of) Indiana,) T. MICHAEL SMITH, as Inheritance Tax) Administrator,) *Defendants.*)

Filed Apr 10, 1970

ORDER

This action is before this court on a petition to transfer the Appellate Court contempt citation of February 26,

1970. The appellee filed its motion to dismiss the petition to transfer in words and figures to wit: (H.I.)

Now, therefore, Hunter, C.J., Arterburn and Jackson, JJ. believe that the petition to transfer should be dismissed. DeBruler, J. is of the opinion that the motion to dismiss be denied. Givan, J. did not participate in this case.

The motion to dismiss is, therefore, granted.

Dated this 10th day of April, 1970.

s/ Donald H. Hunter

DONALD H. HUNTER,
Chief Justice

DeBruler, J. dissenting;

Givan, J. not participating.

IN THE

SUPREME COURT OF INDIANA

STATE OF INDIANA, on relation of) The Mass Transportation Authority of) Greater Indianapolis, a municipal corporation,
Plaintiff,

v. No. 767A39

INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, as a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of The Indiana Revenue Board, TRUDY SLABY ETHERTON, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, as Members of the State Board of Tax Commissioners of Indiana, T. MICHAEL SMITH, as Inheritance Tax Administrator,
Defendants.

Filed June 1, 1970

ORDER

This action is before this court on a petition to transfer the Appellate Court contempt citation of February 26,

1970. The Appellee filed its motion to dismiss the petition to transfer in words and figures to-wit: (H.I.)

The present pleading under the circumstances is sham surplusage and the doctrine of *res judicata* is applicable to all the matters belatedly sought to be presented by this repetitious petition for transfer.

Now, therefore, Hunter, C.J., Arterburn and Jackson, JJ. believe that the petition to transfer should be dismissed, and the motion to dismiss be granted. DeBruler, J. is of the opinion that transfer should be granted. Givan, J. did not participate in this case.

The motion to dismiss is, therefore, granted.

Dated this 1st day of June, 1970.

/s/ Donald H. Hunter

DONALD H. HUNTER,
Chief Justice

DeBruler, J. dissenting.

Givan, J. not participating.

IN THE

APPELLATE COURT OF INDIANA

STATE OF INDIANA, on relation of) The Mass Transportation Authority of) Greater Indianapolis, a municipal cor-) poration,
Plaintiff,

v. No. 767A39

INDIANA REVENUE BOARD,
EDGAR D. WHITCOMB, as a Member) of the Indiana Revenue Board,
JOHN K. SNYDER, Treasurer of the) State of Indiana, and as a Member of) The Indiana Revenue Board,
TRUDY SLABY ETHERTON, Auditor) of the State of Indiana, and as a Mem-) ber of the Indiana Revenue Board,
INDIANA DEPARTMENT OF STATE) REVENUE,
JAMES O. MATHIS, as Commissioner) of the Indiana Department of State) Revenue,
THE STATE BOARD OF TAX COM-) MISSIONERS,
JOSEPH D. GEESLIN, JR., CARLETON) L. PHILLIPPI, as Members of the) State Board of Tax Commissioners of) Indiana,
T. MICHAEL SMITH, as Inheritance Tax) Administrator,
Defendants.

Filed Mar 4, 1970

ORDER

Comes now, Respondent, Trudy Slaby Etherton, Auditor of the State of Indiana, by her attorney of record, and

shows this Court that she has conveyed to the Clerk of the Supreme and Appellate Courts a warrant in the sum of $12,737,228.96 in full satisfaction of the judgment as entered by this Court on December 31, 1968.

Respondent further informs this Court that she executed and delivered this warrant under protest in accordance with the Resolution of Instructions from the Indiana State Board of Finance, whose resolution to that effect is included herewith as affecting said Respondent:

(H.I.)

without waiving the legal and constitutional rights of Respondent.

AND THIS COURT, having examined the foregoing and being duly advised in the premises, now orders, adjudges, and decrees:

I. That Respondent, Trudy Slaby Etherton, Auditor of the State of Indiana, is hereby purged of the contempt charges adjudged by this Court on February 26, 1970.

II. That the Clerk of the Supreme and Appellate Courts shall distribute these funds in accordance with the order of this Court dated December 16, 1969.

III. Dated at Indianapolis, Indiana, this 4th day of March, 1970.

/s/ GEORGE B. HOFFMAN

George B. Hoffman, Jr.,
Acting Chief Justice
Appellate Court of Indiana

(Excerpt from the minutes of
the Indiana State Board of
Finance Meeting, March 4, 1970)

RESOLUTION

On motion duly made, seconded and unanimously carried, the following resolution was made this date by the State Board of Finance:

"It is hereby resolved that the Indiana State Board of Finance protest the payment of the monies claimed by the Mass Transportation Authority of Greater Indianapolis and its successor, Department of Transportation of the Consolidated City of Greater Indianapolis and their attorneys of record whose claim is bottomed on a contingency basis under a so-called lawyer's lien;

"And it is further resolved that the Indiana State Board of Finance instructs the Auditor of State and the Treasurer of State that when they draw and pay such warrants as ordered by the Appellate Court of Indiana in Cause No. 767 A 39 that said Auditor of State and Treasurer of State indicate the official protest of the Indiana State Board of Finance at the time of drawing, delivering and paying said warrant or warrants."

s Edgar D. Whitcomb

EDGAR D. WHITCOMB,
President, Indiana State
Board of Finance

IN THE

APPELLATE COURT OF INDIANA

STATE OF INDIANA, on relation of) The Mass Transportation Authority of) Greater Indianapolis, a municipal cor-) poration, *Plaintiff,*	)	
v.	)	No. 767A39
INDIANA REVENUE BOARD,) EDGAR D. WHITCOMB, as a Member) of the Indiana Revenue Board,) JOHN K. SNYDER, Treasurer of the) State of Indiana, and as a Member of) The Indiana Revenue Board,) TRUDY SLABY ETHERTON, Auditor) of the State of Indiana, and as a Mem-) ber of the Indiana Revenue Board,) INDIANA DEPARTMENT OF STATE) REVENUE,) JAMES O. MATHIS, as Commissioner) of the Indiana Department of State) Revenue,) THE STATE BOARD OF TAX COM-) MISSIONERS,) JOSEPH D. GEESLIN, JR., CARLETON) L. PHILLIPPI, as Members of the) State Board of Tax Commissioners of) Indiana,) T. MICHAEL SMITH, as Inheritance Tax) Administrator, *Defendants.*	)	

Filed Mar 5, 1970

ACKNOWLEDGE OF PAYMENT AND RELEASE

Come now Richard M. Givan and John F. Neff, attorneys of record in the above entitled matter for theplaintiff,

The Mass Transportation Authority of Greater Indianapolis, and do hereby acknowledge receipt of the disbursement of payment of their attorneys fee from Kendal E. Mathews, Clerk of the Supreme and Appellate Courts, pursuant to order of the Appellate Court of Indiana, dated October 21, 1969, and in consideration of said payment on behalf of themselves individually and on behalf of the law firms of Bowen, Myers & Northam, and Lieber & Neff do hereby release the attorneys lien filed in this cause on February 28, 1969.

Dated this 5th day of March, 1970.

/s/ RICHARD M. GIVAN,

RICHARD M. GIVAN,
Individually and on behalf of
the law firm of Bowen, Myers
& Northam

/s/ John F. Neff

JOHN F. NEFF,
Individually and on behalf of
the law firm of Lieber & Neff

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Before me, a Notary Public, in and for said County and State, personally appeared Richard M. Givan and John F. Neff and, acknowledge the execution of the foregoing acknowledge of payment and release.

Witness my hand and notarial seal this 5th day of March, 1970.

/s/ Saundra J. A. Robinson

SAUNDRA J. A. ROBISON
Notary Public

My Commission Expires: 11-7-72

IN THE

APPELLATE COURT OF INDIANA

STATE OF INDIANA, on relation of The Mass Transportation Authority of Greater Indianapolis, a municipal corporation,	*Plaintiff,*	
v.		No. 767A39
INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, as a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of The Indiana Revenue Board, TRUDY SLABY ETHERTON, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, as Members of the State Board of Tax Commissioners of Indiana, T. MICHAEL SMITH, as Inheritance Tax Administrator,	*Defendants.*	

Filed Mar 5, 1970

RELEASE OF PLAINTIFF

Comes now Richard B. Wetzel, the duly appointed, qualified and acting Executive Director of the Department of

Transportation, City of Indianapolis, successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, plaintiff in the above entitled cause, and for and on behalf of the Department of Transportation, City of Indianapolis, in consideration of the sum of $11,909,752.60 receipt of which is hereby acknowledged from Kendal E. Mathews, clerk of the Appellate Court of the State of Indiana does hereby release the said defendants named and each of them and the said Kendal E. Mathews from any and all other demands and claims in the above entitled cause.

/s/ Richard B. Wetzel
RICHARD B. WETZEL

ATTEST:

/s/ Marjorie H. O'Laughlin
MARJORIE H. O'LAUGHLIN
Clerk

LIEBER & NEFF
322 Circle Tower
Indianapolis, Indiana 46204
639-1326

IN THE

APPELLATE COURT OF INDIANA

STATE OF INDIANA, on relation of The Mass Transportation Authority of Greater Indianapolis, a municipal corporation,

Plaintiff,

v. No. 767A39

INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, as a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of The Indiana Revenue Board, TRUDY SLABY ETHERTON, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, as Members of the State Board of Tax Commissioners of Indiana, T. MICHAEL SMITH, as Inheritance Tax Administrator,

Defendants.

Filed Mar 5, 1970

ORDER

Comes now Richard B. Wetzel, the duly appointed, qualified, and acting Executive Director of the Department

of Transportation, City of Indianapolis, successor in interested to the Mass Transportation Authority of Greater Indianapolis, a municipal copporation, plaintiff in the above-entitled cause, and files herein his Release of Plaintiff, in the following words and figures, to-wit:

(H. I.)

And come also Richard M. Givan and John F. Neff, attorneys of record for the plaintiff herein, and file their Acknowledge of Payment and Release, in the following words and figures, to-wit:

(H. I.)

And the Court, having examined said matters, and being duly advised, finds that the Clerk should spread them of record in this matter.

IT IS, THEREFORE, ORDERED AND DECREED that the Clerk of the Supreme and Appellate Courts be, and he is, hereby ordered to spread of record the above described Release of Plaintiff and Acknowledge of Payment and Release.

ORDERED this 5th day of March, 1970.

/s/ George B. Hoffman, Jr.

GEORGE B. HOFFMAN, JR.
Acting Chief Justice

WHITE, J., Not participating